

No. 2463.

**In the United States Circuit Court of
Appeals for the Ninth District.**

THE SOUTHERN PACIFIC CO., A CORPORATION, PLAIN-
TIF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF ARIZONA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted by the Government to recover from the defendant, the Southern Pacific Co., a corporation, penalties for 12 violations of the Federal hours-of-service act.

The last six causes of action were disposed of by demurrer of the plaintiff to the defendant's answer, and the action of the trial court in overruling this demurrer is now before this court for review, being No. 2443, thus leaving the first six causes of action of the complaint for trial.

Each of the first six causes of action here in question relates to the service of individual members of a single train crew and charge a violation of the hours-

of-service act in that the defendant required and permitted one of its train employees, engaged and connected with the movements of its train in interstate commerce, to be and remain on duty for a longer period than 16 consecutive hours, the period of service alleged being 16 hours and 59 minutes for the two members of the engine crew, to wit, from 5.30 a. m. on December 21, 1912, to 10.29 p. m. on said date, and 19 hours and 10 minutes for the four members of the train crew, to wit, from 5.30 a. m. on December 21, 1912, to 12.40 a. m. December 22, 1912.

Defendant's answer admitted all the material allegations of the complaint except that the employees in question were on duty continuously for more than 16 consecutive hours, which it denied.

The case was tried to a jury, and the defendant contended that the four employees constituting the train crew were released at Bowie for the following definite periods (rec., p. 32):

from 9.15 a. m. to 11.40 a. m., 2 hours and 25 minutes; from 1.20 p. m. to 2.20 p. m., 1 hour—

and that the two members of the engine crew were released at Bowie from 1.30 p. m. to 2.30 p. m., 1 hour (rec., p. 34); that during such periods these employees were not "on duty" within the meaning of the hours of service law, and that deducting such periods of release neither of the employees in question was on duty for a longer period than 16 consecutive hours.

The evidence was undisputed that the employees in question commenced duty and finally went off duty at the times named in plaintiff's complaint (rec., pp. 32, 34), the only question being whether they were "on duty" during the times they were alleged to have been released. The material portions of the evidence introduced on this point may be briefly summarized as follows:

A notation on the train sheet showed that the four members of the train crew were released at Bowie from 9.15 a. m. until 11.40 a. m., and from 1.20 p. m. until 2.20 p. m. (Rec., p. 32.) The first release was sent by message to the agent and read to release the crew and call for them when he could give them an engine, to advise time released and recalled, and to see that it was as much as an hour, so that credit could be had for it. (Rec., p. 32, 62.) A second message was sent to the conductor covering the release from 1.20 p. m. to 2.20 p. m. (Rec., p. 32.) The notation on the train sheet was made from a message received from the conductor stating that this extra had been released at Bowie at 9.15 a. m. and called to go to work at 11.40 a. m., and that they had been released at 1.20 p. m. to go to work at 2.20 p. m. (Rec., p. 33, 61.)

The engineer and fireman of this crew were released at Bowie from 1.30 p. m. to 2.30 p. m., but the records do not show for what purpose. (Rec., p. 34.) The notation on the train sheet of this release was made

by a despatcher who came on duty at 4 p. m. (Rec., p. 34.)

The purpose of the first release at Bowie was so that the engine of this train could be used for other service. (Rec., p. 32.) The release was given so it could be used as being off duty and to work the employees to get them nearer Benson, the destination of the trip. (Rec., p. 42.) The reason the first release was given to the train crew for 2 hours and 25 minutes was at that time it looked as though the engine would be back to Bowie and start work about 11.40 a. m. (Rec., p. 42.) If conditions had been normal the release would not have been given at Bowie; but on account of conditions there, with a lot of switching to do, the releases were meant to cover delays which they saw would be encountered at Bowie. (Rec., p. 44.)

During the times released the train crew was around the hotel and reading or sitting under trees or in the caboose (rec., p. 49), and were not performing any active work for the railroad company. (Rec., p. 39.) Between the two periods of releases, from 11.40 a. m. to 1.20 p. m., the train crew was under instructions, but was not doing any work. (Rec., p. 43.) The conductor's trip report shows that they were at Bowie 3 hours and 25 minutes waiting for engine. (Rec., p. 64.)

The chief dispatcher testified that the company did not know exactly when they could get them out of Bowie, and that the train did not finally leave there

until 6 p. m. (Rec., p. 43.) The message sent to the agent did not give any definite period to release crew, but simply said "release them." (Rec., p. 43.) They did not know, when they were released, how long they would be at Bowie. (Rec., p. 44.) The conductor testified that he did not know when he was going to be called (rec., p. 49) and that the release stated to be off until 11.40 a. m., until their engine got back, that they could not tell how long, and the operator told them they would be off duty until called. (Rec., p. 52.)

The chief dispatcher also testified that if released at Bowie for a definite period from 9.15 to 11.40 a. m. they would report again at 11.40 without being called (rec., p. 43) and that if he had wanted these men at Bowie to go to work before the 2 hours and 25 minutes were up he would have instructed the agent to call them (rec., p. 45), and that if he found that they were wanted at 10. a. m. he had a right to call them, but that he did not need them. (Rec., p. 46.) Conductor Sullivan testified that his train book showed that he was called to go to work at 11.40 a. m.; that they were called at 11.40 a. m. to go to work as soon as they could after that; that he did not know when he was going to be called (rec., p. 49); and that he did not know why they were released from 1.20 until 2.20 p. m. (Rec., p. 48.)

The engineer testified that he and his fireman got to Bowie at 1.30 p. m. and that they were given a release for at least an hour; that he had dinner,

smoked, and went out on the platform and went to sleep, and that some one came out on the platform and waked him up and told him that they were going to work at 2.30 p. m. and that they went back to their engine. (Rec., pp. 54, 55.)

At the close of the evidence the court sustained the motion of the plaintiff, requesting a directed verdict in its favor, and refused the motion of the defendant to direct a verdict in its favor, or, on its denial, to permit the case to go to the jury.

The defendant has brought the case to this court for review upon writ of error and has assigned as error the action of the trial court in granting the motion of the plaintiff and refusing that of the defendant for a directed verdict, as well as certain rulings made during the course of the trial relative to the admissibility of evidence. (Assignments of error, Rec., pp. 77 to 96.)

QUESTIONS INVOLVED.

I.

DID THE TRIAL COURT ERR IN DIRECTING A VERDICT FOR THE GOVERNMENT?

(Assignments of error XIII, XIV, and XV.)

II.

DID THE TRIAL COURT ERR IN THE EXCLUSION OF EVIDENCE AND EXHIBITS OFFERED BY THE DEFENDANT CARRIER?

(Assignments of error I, II, IV, V, VI, VII, VIII, IX and III, X, XI, and XII.)

I.

DID THE TRIAL COURT ERR IN DIRECTING A VER-
DICT FOR THE GOVERNMENT.

Whether this entire train crew was on duty in excess of the period fixed by the statute depends solely upon the determination of the question whether or not the so-called releases given them while en route are effectual to prevent the continuous running of their time of service.

This train crew was attached to this train as its crew until the final destination was reached.

Disregarding *at this time* the question whether such releases were for such short periods and at such places that they afforded no properly appreciable periods of rest and therefore did not avail to break the continuity of service, upon which ground the judgment below properly could have been justified, the Government contends that the judgment of the District Court may be sustained on the broader ground that when a train crew starts with a train to a designated terminal and has the duty of taking such train to that terminal it remains "on duty" within the meaning of the hours of service act, notwithstanding any temporary delays en route and regardless of any so-called releases en route unless the obligation to perform service on such trip is finally discharged. During the whole of the trip each one of the train crew is so attached to the train that his obligation to go on to the final destination

remains and he is therefore "on duty" within the meaning of this act.

Such releases afford none of the substantial protection which Congress intended when the eight-hour period available for rest was established in the act.

Railroading has always been recognized as a hazardous occupation. Operating trains has always been fraught with menace to the safety of employees and to the public.

The operation of trains by men who have had normal rest is not an easy task.

Congress has acted upon the basis that the continuous operation of trains for more than 16 hours is such a menace that it is to be no longer permitted.

But may a longer period be so split up into periods of service that the menace at which the law was directed may still remain without any violation of the statute?

Even if courts may feel compelled to say that the provisions of the statute permits aggregate service of 16 hours in a 24-hour period when such service is called for, assignments of duty to *different* trains, when such assignment of duty is to one particular train and such assignment continues more than 16 hours to bring that train to its final terminal, the device of a release to cover the time of detentions at stations en route ought not to be sufficient to prevent the application of the statute when by such continuous assignment to a particular train for such excessive time there is established a clear violation of the purpose and spirit of the law.

The record in this case shows that the releases were issued for the sole purpose of keeping this train crew on duty until the train reached its terminal or end of its run.

Operation of a train from its point of origin to its point of destination is a unit.

The duty to operate such a train from its point of origin to its destination is a unit.

The interims at points along the route are merely incidental.

The duty to continue and conclude the trip remains, and therefore employees while they remain the designated crew of a particular train while such train is on a trip are at all times on duty within the meaning of this safety statute.

II.

DID THE TRIAL COURT ERR IN THE EXCLUSION OF EVIDENCE AND EXHIBITS OFFERED BY THE DEFENDANT CARRIER?

As to exclusion of evidence and exhibits offered in behalf of the carrier, they may all be included under two headings, viz, (a) evidence tending to show good faith and diligence on the part of the carrier (assignments of error III, X, XI, and XII), and (b) questions calling for conclusion of the witness upon precise question presented for judicial determination (assignments of error I, II, IV, V, VI, VII, VIII, and IX).

(a) The good faith and diligence of the carrier are not in issue in cases under the hours-of-service act. The statute fixes a standard of duty and must be obeyed.

If there is any evidence of a violation, orders of the carrier showing efforts to prevent violation are immaterial and inadmissible.

In cases of this same general character, good faith and due diligence are not material.

Chicago, Burlington & Quincy Railroad v. United States (220 U. S., 559, and cases cited), and *Delk v. St. Louis & San Francisco Railroad Co.* (220 U. S., 580).

See also *Johnson v. Southern Pacific Co.* (196 U. S., 1).

(b) Nor was there any error in the exclusion of the conclusions of the witness on the precise question presented for judicial determination.

When the exact hour of beginning work and the hour of the final conclusion of all work, together with all the circumstances surrounding the so-called release, were before the court, upon facts which were without substantial dispute, the determination of the number of hours the employees in question were "on duty" within the meaning of this act became a question of law for the court, and the conclusion thereon by any witness was entirely immaterial and inconsequential.

Wherefore, it is respectfully submitted that there was no error in the rulings of the court below and the judgment should be affirmed.

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